Saint Louis University Law Journal

Volume 46
Number 4 *(Fall 2002)*

Article 6

9-24-2002

Party Poopers: The Supreme Court Overlooks the Party in Federal Election Commission v. Colorado Republican Federal Campaign Committee

Amanda G. Altman

PARTY POOPERS: THE SUPREME COURT OVERLOOKS THE PARTY IN *FEDERAL ELECTION COMMISSION v. COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE*

I. INTRODUCTION

It is often said that a chain is only as strong as its weakest link; if this is true, then a recent decision of the United States Supreme Court proved just how weak its rulings are in the area of campaign finance. In a 5-4 decision, the Supreme Court, in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*,[1] upheld limits on the amount of money a political party could spend on the campaigns of its candidates.[2] The decision marked only the second time the Court has ruled on the constitutionality of campaign finance laws with respect to political parties.[3] In reaching a decision in the case, however, the Court overlooked several important issues relating to political parties, resulting in a generally disappointing opinion plagued with weak links in its reasoning.

The provision at issue in *Colorado II* was part of the Federal Election Campaign Act of 1974 ("FECA"), which set limits on contributions made by individuals, political parties and political action committees ("PACs").[4] The

1. 121 S. Ct. 2351 (2001) [hereinafter *Colorado II*].

2. *See id*. at 2371.

3. The first time the Court ruled on this point was in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 518 U.S. 604 (1996) [hereinafter *Colorado I*].

4. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974). As early as 1906, Congress recognized the need for campaign finance reform, and between that time and 1966, it enacted various statutes, which together, sought to: (1) limit the disproportionate influence of wealthy individuals and special interest groups on the outcome of federal elections; (2) regulate the spending in federal election campaigns; and (3) deter abuses by mandating public disclosure of campaign finance. *See* Federal Election Commission, The FEC and the Federal Campaign Finance Law, *available at* http://www.fec.gov/pages/fecfeca.htm (last visited Jan. 5, 2002). In 1971, these laws were consolidated into the Federal Election Campaign Act of 1971. *See id*. The 1971 Act, though more stringent than any previous attempts at campaign finance reform, was difficult to enforce because there was no central administrative authority. *See id*.

Later, the FECA was amended in response to the July 1972 burglary of the Democratic National Committee in the Watergate Apartment complex and the events that ensued, including the resignation of President Richard M. Nixon in 1974. *See id.* Although Nixon was almost sure to win his bid for re-election in the 1972 Presidential race, his advisors formed the Committee to

Supreme Court had its first opportunity to rule on the constitutionality of the FECA in 1976 in *Buckley v. Valeo*.[5] In *Buckley*, the Court sustained the limits on individual contributions,[6] but held that limitations on campaign expenditures, independent expenditures by individuals and groups, and expenditures by a candidate from his personal funds were unconstitutional.[7]

At first glance, the holding in *Buckley* seems simple to understand: contribution limits are constitutional, while restrictions on expenditures are unconstitutional. A problem arises, however, because the Act's definition of a "contribution" includes "expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents."[8] This effectively makes an expenditure that is coordinated with a candidate a contribution for purposes of the Act.[9] "In general, FECA treats all money spent by an individual or organization in coordination with a candidate as though it were a direct contribution to that candidate, subject to the Act's contribution ceiling."[10] Therefore, under *Buckley*, limits on independent expenditures—those not made in coordination with a candidate—are unconstitutional, while contributions and coordinated expenditure limits are constitutional.

Political parties, however, are not covered under the general provisions of the Act.[11] Instead, Congress adopted the Party Expenditure Provision.[12] The

Re-elect the President, a committee later known as CREEP. *See* The American President, Richard Nixon: The Comeback President, *available at* http://www.americanpresident.org/KoTrain/Courses/RN/RN_Campaigns_and_Elections.htm (last visited Jan. 5, 2002). The committee raised hundreds of thousands of dollars from corporations promising payoffs of favorable legislation and ambassadorships in return. *See id.* The committee used the money to pay off political con artists and dirty tricksters. Nixon and the White House were not linked to the burglary until later, and the President won the election in a landslide, but reports of serious financial abuses led Congress to amend its campaign finance laws. Not only did the 1974 amendments set contribution limits, they also established the Federal Election Commission ("FEC") to enforce the provisions of the FECA. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

5. 424 U.S. 1 (1976) (per curiam).

6. The individual contribution limits the Court discussed included limitations on contributions by individuals and groups to candidates and authorized campaign committees, contributions by political committees, and limits on total contributions during a calendar year. *See id*. at 1-2.

7. *See id*. at 143.

8. 2 U.S.C. § 441a(a)(7)(B)(i) (1994).

9. *See Colorado II*, 121 S. Ct. 2351, 2357 (2001). Various limitations on contributions are established for individuals and political committees in the FECA.

10. Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 625 (2000).

11. *See* 2 U.S.C. § 441a(a)(A)-(B) (1994).

12. *Id.* § 441a(d)(3). *See also* Kirk J. Nahra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities*, 56 FORDHAM L. REV. 53, 91 (1987) (noting that

provision places limitations on the amount political parties may spend in connection with their candidates for the office of President and for other federal offices.[13] In its last term, the Supreme Court examined the constitutionality of the limitations imposed on a party's coordinated expenditures when it decided *Colorado II*.[14] The case arose out of a senatorial election in Colorado. The specific provision at issue provided that in elections for the United States Senate, each national and state party committee, "[m]ay not make any expenditure in connection with the general election campaign of a candidate for Federal office . . . which exceeds . . . the greater of (i) 2 cents multiplied by the voting age population of the State . . .; or (ii) $20,000."[15]

Originally, the FEC presumed that political parties were only capable of making expenditures that were in coordination with their candidates; meaning that all political party expenditures were subject to the limitations in the Party Expenditure Provision.[16] In *Colorado I*, the Supreme Court held that political parties could make independent expenditures, that the expenditure in question was an independent expenditure, and that under *Buckley*, it was an unconstitutional limit on independent expenditures.[17] Therefore, as applied to this particular expenditure, the provision was unconstitutional. In *Colorado I*, however, the Court avoided the Colorado Republican Party's broader claim that the entire Party Expenditure Provision was unconstitutional, including the limits imposed on coordinated expenditures.[18] The question again presented itself before the Court in *Colorado II*. This time the Court faced the issue and held that a party's coordinated expenditures could be limited in light of the substantial governmental interest in preventing corruption.[19]

In all of the campaign finance cases, the Court has wrestled with how to properly weigh First Amendment freedoms against governmental interests.[20]

---

while the 1974 amendments to the FECA respected the role of political parties by separating them from other political actors, the Act also provided the first statutory limits on party activity).

13. *See* 2 U.S.C. § 441a(d)(3)-(4) (1994).

14. *See generally Colorado II*, 121 S. Ct. 2351 (2001).

15. 2 U.S.C. § 441a(d)(3)(A) (1994). The FEC took the position that a party may make coordinated expenditures up to the above amount, in addition to the amount of direct contributions permitted by generally applicable contribution limits. *See Colorado II*, 121 S. Ct. at 2366 n.16.

16. *See* David J. Lekich, Note, *Still Blinking at Political Reality in Federal Elections*: Colorado Republican Federal Campaign Committee v. Federal Election Commission, 75 N.C. L. REV. 1848, 1873 (1997).

17. *Colorado I*, 518 U.S. 604, 604 (1996).

18. *Id*. Instead, the Court remanded the case to the District Court of Colorado to further examine this issue. For a discussion of the District Court's holding, see *infra* note 72 and accompanying text.

19. *See Colorado II*, 121 S. Ct. 2351, 2351 (2001).

20. *See* Jeremy Marsh, Note, *Missouri's Sacrificial Lamb: Political Party Contributions and Campaign Finance Reform in* Missouri Republican Party v. Lamb, 45 ST. LOUIS U. L.J. 925, 933

The Court has held that the only government interest sufficient to uphold provisions of the FECA is the interest in preventing corruption or the appearance of corruption because the FECA's contribution and expenditure limitations "operate in the area of the most fundamental First Amendment activities."[21] Political expression, including the rights of freedom of speech and the freedom of associating with others of similar political beliefs, is at the core of the First Amendment.[22] In deciding which provisions to uphold, the Court applies a standard known as exacting scrutiny, in which it asks, "whether the restriction is 'closely drawn' to match what we have recognized as the 'sufficiently important' government interest in combating political corruption."[23] In *Colorado II*, the party argued first that it should be subject to a higher standard of scrutiny before its speech could be limited, and, in the alternative, that there was not enough evidence of corruption to uphold the limits on its coordinated expenditures.[24]

This Note examines the Court's opinion in *Colorado II* and addresses issues relating to political parties that the Court, particularly the majority, did not sufficiently consider in making its ruling. Part I of this Note looks at the background leading up to *Colorado II*, beginning with a discussion of *Buckley* and followed by an examination of the Court's decision in *Colorado I.* Part II analyzes the Court's decision in *Colorado II*, including both the majority and dissenting opinions. Part III argues that the Court's reasoning in *Colorado II* left much to be desired because it failed to give sufficient consideration to the following issues: (1) the tension it was creating between the decision in *Buckley* and the decision in *Colorado II*; and (2) the importance of political parties in American society, including the status given to them in the Constitution as well as their role in furthering the structure of democracy. Finally, Part IV discusses the most recent changes regarding campaign finance reform legislation, specifically examining how new laws might affect political parties.

(2001). Marsh noted that the First Amendment is the biggest obstacle to campaign finance reform in America, and that the guarantee of free political speech would appear to be "an insurmountable obstacle to creating effective limits on campaign spending." *Id.*

21. *See* Buckley v. Valeo, 424 U.S. 1, 14 (1976) (noting that the government's interest in leveling the playing field for all candidates and trying to counter skyrocketing costs of campaigns were not sufficient reasons to limit political expression).

22. *Id.* at 14-15 (noting that "[t]he First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people," and "the First and Fourteenth Amendments guarantee freedom to associate with others for the common advancement of political beliefs and ideas.") (internal citations and quotation marks omitted).

23. *Colorado II*, 121 S. Ct. at 2366 (citation omitted).

24. *Id.* at 2360, 2366.

II. RELEVANT SUPREME COURT CAMPAIGN FINANCE DECISIONS: *BUCKLEY* AND *COLORADO I*

A. Buckley v. Valeo

Buckley v. Valeo[25] was the Supreme Court's first opportunity to rule on the constitutionality of the FECA,[26] and it provides the general context for determining the constitutionality of campaign finance reform laws. In a per curiam opinion[27] spanning approximately 150 pages, the Court upheld contribution limits, but found limitations on campaign expenditures, independent expenditures, and a candidate's expenditures from his personal funds unconstitutional.[28]

The question the Court sought to answer in *Buckley* was not whether Congress had the power to legislate in the area of federal elections, but whether the "specific legislation that Congress has enacted interferes with First Amendment freedoms."[29] The Court recognized that the limitations that the Act placed on expenditures and contributions operated in the area of fundamental First Amendment activities of freedom of speech and the right of association.[30]

In addressing limits the FECA placed on contributions, the Court stated that "a limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor's ability to engage in free communication."[31] This is because a contribution is merely symbolic; it serves only as a general expression of support and communicates no underlying basis for that support.[32]

25. *Buckley*, 424 U.S. at 1.

26. In *Buckley*, the Court actually considered a challenge to several portions of the FECA as well as to portions of the Internal Revenue Code of 1954. This Note is only concerned with the challenges regarding contribution and expenditure limitations.

27. Only Justices Powell, Brennan, and Stewart joined all parts of the Court's per curiam opinion. Chief Justice Burger and Justices White, Marshall, Rehnquist and Blackmun each joined the opinion in part and dissented in part, and each filed his own opinion.

28. *See* Buckley v. Valeo, 424 U.S. 1, 1 (1976). The Court of Appeals for the District of Columbia had upheld the constitutionality of both the Act's expenditure and contribution provisions.

29. *Id*. at 14.

30. *See id.* at 14-15 (noting that freedom of political expression is "integral to the operation of the system of government established by our constitution").

31. *Id*. at 20.

32. *See id*. at 21. The Court further noted that:

> A limitation on the amount of money that a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues.

Id.

While the Court considered four provisions that limited contributions, the most significant was one which placed a $1000 ceiling on contributions by individuals and groups (not including political parties) to candidates and authorized campaign committees.[33] The Court held that preventing corruption, the primary purpose for the Act, was sufficient to find all of the contribution limits constitutional.[34] The Court stated that contributions not only carry a danger of actual corruption, but also a potential for the appearance of corruption.[35] The $1000 ceiling dealt directly with the problem of large contributions, an area associated with actual and potential corruption, while still allowing people to engage in "independent political expression."[36]

In discussing the expenditure limitations in the FECA, the Court found that they represented a substantial restraint on the quantity and diversity of political speech.[37] In its opinion, the Court considered three types of expenditures that the FECA sought to limit: (1) expenditures "relative to a clearly identified candidate,"[38] also called independent expenditures; (2) a candidate's expenditures from personal or family resources;[39] and (3) overall campaign expenditures.[40]

33. *See* Buckley v. Valeo, 424 U.S. 1, 23 (1976).

34. *See id*. at 26-27. The Court noted that:

> To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.

Id.

35. *See id*. at 27. The appearance of corruption stems from the "public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *Id.*

36. *Id*. at 28.

37. *See id.* at 19 ("A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of the exploration, and the size of the audience reached.").

38. Buckley v. Valeo, 424 U.S. 1, 39 (1976). FECA placed a $1000 ceiling on the amount a person could expend relative to a clearly identified candidate. *See* 18 U.S.C. § 608(e)(1) (1994). Although these expenditures were made "relative to a clearly identified candidate," they were considered "independent" because of the absence of prearrangement or coordination of the expenditure with the candidate or his agent. *Buckley*, 424 U.S. at 47. As the Court noted, this section "limits expenditures for express advocacy of candidates made totally independently of the candidate and his campaign." *Id*.

39. *Buckley*, 424 U.S. at 51. Section 608(a)(1) placed limits on the amount a candidate could spend from his personal funds or the personal funds of his immediate family in connection with his campaign. 18 U.S.C. § 608(a)(1). The amount varied depending on what office the candidate sought. *Id*.

40. *Buckley*, 424 U.S. at 54. Section 608(c) placed limitations on overall campaign expenditures by candidates seeking nomination for election and election to federal office. 18 U.S.C. § 608(c).

Ultimately, the Court held the limits placed on all three types of expenditures unconstitutional. The Court determined that the constitutionality of each of the provisions turned on whether the governmental interest advanced in their support could satisfy the exacting scrutiny applicable to limitations on core First Amendment rights of political expression.[41]

With regard to the ceiling placed on independent expenditures, the Court found that it failed "to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process"[42] and that it "heavily burden[ed] core First Amendment protection."[43] Furthermore, the Court noted that the governmental interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections" was not sufficient to justify the independent expenditure limits.[44]

The Court made a similar determination with respect to the limitations placed on the expenditures by candidates from personal or family resources and those placed on the overall campaign expenditures by candidates seeking nomination for election and election to federal office. It again found that these limitations did not further the governmental interest of preventing corruption or the appearance of corruption. In fact, the Court noted that when a candidate uses personal funds it "reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limitations are directed."[45] Furthermore, the limits on overall expenditures were not necessary because the problem associated with large expenditures is the danger of dependence on large contributions, a problem addressed in the Act's contribution limitations and disclosure provisions.[46]

41. *See Buckley*, 424 U.S. at 44-45. For an explanation of exacting scrutiny, see *supra* note 23 and accompanying text.

42. *Id*. at 47-48. The Court made two points in reaching this conclusion. First, it argued that even if large independent expenditures posed the same dangers of actual or apparent quid pro quo arrangements as large contributions, 18 U.S.C. § 608(e)(1) did nothing to eliminate those dangers. *Id.* at 45. Second, the Court noted that the limitations in § 608(e)(1) did not aid in preventing attempts to circumvent the Act. *Id.* at 46-47.

43. *Id*. at 48.

44. *Id*. at 48-49.

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

Id. (internal citations and quotation marks omitted).

45. *Id*. at 53. The Court of Appeals had also noted that "the core problem of avoiding undisclosed and undue influence on candidates from outside interests has lesser application when the monies involved come from the candidate himself or from his immediate family." Buckley v. Valeo, 519 F.2d 821, 855 (D.C. Cir. 1975).

46. *Buckley*, 424 U.S. at 55.

Although the Court invalidated the provisions of the FECA that dealt with independent expenditures, it "let stand FECA's regulation of spending 'in connection with' an election campaign, otherwise known as a coordinated expenditure."[47] This category of campaign spending, which applies only to political parties, eventually forced the Supreme Court to examine campaign spending in the "political party context."[48]

B. Colorado I: The As-Applied Challenge

Buckley established the general precedent that the Constitution permits individual contribution limits but it prohibits independent expenditure limits. *Colorado I*, however, provided the Supreme Court with its first chance to examine the limitations in the context of political parties.[49] Furthermore, *Colorado I* supplied the foundation for *Colorado II* as the two cases arose out of the same facts.

In 1986, the Colorado Republican Federal Campaign Committee bought radio advertisements attacking Timothy Wirth, the Democratic Party's likely senatorial candidate.[50] When the ads were purchased, the Colorado Republican Party had not yet chosen its senatorial candidate.[51] The FEC claimed that the party's "expenditure" exceeded the dollar limits that a provision of the FECA imposed on political parties.[52] The party argued that the expenditure limitations were unconstitutional as applied to the specific expenditures at issue, and also attacked the constitutionality of the entire Party Expenditure Provision.[53]

Ultimately, the Supreme Court decided that the expenditure in question in *Colorado I* was an independent expenditure, which according to *Buckley*, could not be restricted in light of the First Amendment.[54] Although seven

47. Marsh, *supra* note 20, at 939. FECA treats coordinated expenditures as contributions. For further discussion, see *supra* note 8 and accompanying text.

48. *See id.*

49. *See Colorado I*, 518 U.S. 604, 628 (1996) (Kennedy, J., concurring in the judgment and dissenting in part) ("We had no occasion in *Buckley* to consider the possible First Amendment objections to limitations on spending by parties.").

50. *See id*. at 608. Wirth announced in January that he would seek the open Senate seat in November, but the ads were bought in April, before the Democratic primary. *Id.* at 612.

51. *Id*. at 608.

52. *Id.* The provision limited the amount of money a party could spend " 'in connection with' a 'general election campaign' for congressional office." *See id*. (quoting 2 U.S.C. § 441a(d)(3)). The FEC's charge came after the State Democratic Party complained. *Id.* at 612. It claimed the Colorado Party was left without a spending balance after it allotted it $103,000 general election allotment to the National Republican Senatorial Committee. *Id*.

53. *Id.* at 612.

54. *Colorado I*, 518 U.S. at 614. The Court's reasoning was as follows:

> Beginning with *Buckley*, the Court's cases have found a fundamental constitutional difference between money spent to advertise one's views independently of the candidate's

justices agreed with the judgment, the Court was divided, and three basic positions emerged: First, the three justices that joined in the plurality opinion, Justices Breyer, Souter and O'Connor, did not want to reach the party's broad claim that the Party Expenditure Provision was unconstitutional on its face. The plurality opinion focused only on the as-applied challenge to the Party Expenditure Provision. The opinion addressed the fact that a political party's rights were at issue rather than those of an individual and noted that "[t]he independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees."[55] It further recognized that there were no "special dangers of corruption associated with political parties that tip the constitutional balance in a different direction,"[56] and that the Government did not point to any evidence that suggested a corruption problem with respect to independent party expenditures.[57] In deciding not to reach the party's facial challenge to the statute, the plurality opinion claimed that the lower courts' opinions and the parties' briefs did not "squarely isolate, and address, party expenditures that *in fact* are coordinated."[58]

Second, Justices Thomas, Kennedy and Scalia along with Chief Justice Rehnquist concurred in the judgment, but all wanted to reach the Party's broader challenge.[59] Justice Kennedy filed a concurring opinion that argued

> campaign and money contributed to the candidate to be spent on his campaign. This difference has been grounded in the observation that restrictions on the contributions impose only a marginal restriction upon the contributor's ability to engage in free communication. . . . In contrast, the Court has said that restrictions on independent expenditures significantly impair the ability of individuals and groups to engage in direct political advocacy and represent substantial . . . restraints on the quantity and diversity of political speech.

Id. at 614-15 (internal citations and quotation marks omitted).

55. *Id*. at 616.

56. *Id.* In further discussing the corruption issue, the Court stated that the danger involved is that a donor could give a $20,000 donation to a party to be used for an independent expenditure in support of a candidate, thus circumventing the $1000 limitation that an individual may contribute to a candidate. *Id*. at 616-17. "We could understand how Congress, were it to conclude that the potential for evasion of the individual contribution limits was a serious matter, might decide to change the statute's limitations on contributions to political parties." *Id.* at 617.

57. *Id*. at 618. The opinion also suggested that Congress wrote the Party Expenditure Provision "for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending," rather than because of a special concern for corruption. *Id*.

58. *Id.* at 624.

59. *Colorado I*, 518 U.S. 604, 626 (1996) (Kennedy, J., concurring in the judgment and dissenting in part). Justice Kennedy argued that the Party preserved its claim throughout the lower court proceedings and that because of this, the Court should reach the issue and not remand the case. *See id*. at 626. Justice Thomas noted that when the Party filed its counterclaim, all party expenditures were treated as coordinated expenditures; therefore, a reference to expenditures, meant both independent and coordinated and the lack of a specific reference to coordinated

not only in favor of reaching the facial challenge, but also that the Party Expenditure Provision was unconstitutional.[60] He stated that under the statute, it is "both burdensome and quite unrealistic for a political party to attempt the expenditure of funds on a candidate's behalf . . . without running afoul of FECA's spending limitations."[61] His opinion argued that contribution limits upheld with respect to individuals and other associations did not apply to political parties because:

> It makes no sense . . . to ask, as FECA does, whether a party's spending is made "in cooperation, consultation, or concert with" its candidate. The answer in most cases will be yes, but that provides more, not less, justification for holding unconstitutional the statute's attempt to control this type of party spending, which bears little resemblance to the contributions discussed in *Buckley*.[62]

Kennedy further noted that a party and its candidates are "inextricably intertwined" because the party's fate in an election is dependent on its candidate; therefore, the speech of a party cannot be separated from the speech of the candidate, and the party's spending in cooperation with the candidate "is indistinguishable in substance from expenditures by the candidate or his campaign committee."[63]

Justice Thomas also filed an opinion, in which he made two arguments: (1) overrule *Buckley*; and (2) the corruption rationale does not apply when political parties are the subjects of regulation.[64] Thomas based his argument in favor of overruling *Buckley* on two points: first, the contribution/expenditure distinction articulated in *Buckley* "lacked constitutional significance,"[65] and second,

expenditures did not prevent the Court from reaching the issue. *See id*. at 632 (Thomas, J., concurring in the judgment and dissenting in part).

60. *Id.* at 626 (Kennedy, J., concurring in the judgment and dissenting in part). Chief Justice Rehnquist and Justice Scalia joined this opinion.

61. *Id.* at 627.

62. *Id.* at 629. Justice Kennedy continued, saying that a party spending in coordination with a candidate communicates the underlying basis for a party's support, that the candidate will be elected to office and further the party's political agenda. *Id*. at 629-30.

63. *Id*. at 630. Because *Buckley* held that a candidate cannot be restricted in the amount he spends on his campaign, it follows that a party, whose speech and spending cannot be separated from that of its candidate, can also not be limited. *See id.*; *see also* Buckley v. Valeo, 424 U.S. 1, 54-59 (1976).

64. *Colorado I*, 518 U.S. 604, 631 (1996) (Thomas, J., concurring in the judgment and dissenting in part).

65. *Id*. at 636. Thomas argued that "[c]ontributions and expenditures both involve First Amendment expression because they further the discussion of public issues and debate on the qualifications of candidates . . . integral to the operation of the system of government established by our Constitution." *Id*. (internal quotation marks and citations omitted). He further noted that "giving and spending in the electoral process also involve basic associational rights under the First Amendment." *Id*. at 637. He noted that the Court previously held that an interference with the freedom of a party is also an interference with the freedom of the individuals associated with

because both contributions and expenditures operate in an area central to the First Amendment, they should be subjected to strict scrutiny rather than exacting scrutiny.[66]

Thomas also noted, however, that even without overruling *Buckley*, the Party Expenditure Provision still violated the Constitution.[67] He argued that "the very aim of a political party is to influence its candidate's stance on issues, and, if the candidate takes office or is reelected, his votes."[68] Therefore, it is not really possible for a party to "corrupt" its candidates, and thus no sufficient government interest exists to limit party expenditures.[69]

Finally, Justices Stevens and Ginsburg dissented claiming that all political party spending in relation to the election of a candidate should be treated as a contribution upon which limits should be placed.[70]

III. *COLORADO II*: THE FACIAL CHALLENGE

After the decision in *Colorado I*, the Supreme Court remanded the case to the district court to consider the Party's broader claim: all limits on political party expenditures in connection with congressional campaigns are facially unconstitutional even as to spending coordinated with a candidate.[71]

On remand, the District Court of Colorado held in favor of the Party and stated that the limits on coordinated expenditures were unconstitutional.[72] The court found that the FEC failed to offer evidence demonstrating a compelling need for limiting political parties' coordinated expenditures.[73] In holding for the Party the court stated, "[b]ecause the FEC . . . failed to offer relevant,

that party. *See id*. (citing Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (plurality opinion)). Limiting an individual's rights to contribute as many resources as he wishes to the pool also limits his ability to associate for effective advocacy. *Colorado I*, 518 U.S. at 637.

66. *Id*. at 640. Strict scrutiny requires a compelling governmental interest and legislative means narrowly tailored to serve that interest. *Id*. at 641. For an explanation of exacting scrutiny, see *supra* note 23 and accompanying text.

67. *Id*. at 644.

68. *Id*. at 646.

69. *See Colorado I*, 518 U.S. at 646 (Thomas, J., concurring in the judgment and dissenting in part) ("The structure of political parties is such that the theoretical danger of those groups actually engaging in *quid pro quos* with candidates is significantly less that the threat of individuals or others doing so.").

70. *Id.* at 648 (Stevens, J., dissenting). Stevens gave three reasons for limiting all political party spending: (1) the limits avoid the appearance and the reality of a corrupt political process; (2) there is an interest in blocking the attempts of individuals and certain organizations from circumventing the FECA's limits on them; and (3) the Government has an interest in leveling the playing field, and constraining the costs of federal campaigns furthers this goal. *Id*. at 648-49.

71. *Colorado II*, 121 S. Ct. 2351, 2356 (2001).

72. *See* Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 41 F. Supp. 2d 1197 (D.Colo. 1999).

73. *See id.* at 1213.

admissible evidence which suggests that the coordinated party expenditures must be limited to prevent corruption or the appearance thereof."[74]

A three-judge panel in the Tenth Circuit affirmed the district court's decision, 2-1.[75] The majority found that the FEC had not demonstrated that political parties' coordinated spending corrupts, or presents the appearance of corrupting the electoral process.[76] In addition, the Tenth Circuit recognized that *Buckley* upheld limits on contributions, and that the FECA treated political parties' coordinated expenditures as contributions, but the court argued that limitations on political parties created more that just a "marginal restriction on upon the [parties'] ability to engage in free communication."[77]

A. The Parties' Arguments to the Supreme Court

The FEC argued the case along *Buckley* lines, taking the precedent even further. It claimed that the Party's coordinated expenditures were the same as party contributions, which under *Buckley* were subject to limits. The FEC also argued that unlimited coordinated expenditures from a party to the candidate "would induce individual and other nonparty contributors to give to the party in order to finance coordinated spending for a favored candidate beyond the contribution limits binding on them."[78]

The Party, on the other hand, argued two points: (1) the coordinated relationship between a party and its candidate so defines the party that it cannot function without coordinated spending; and (2) a party is uniquely able to spend in ways that promote candidate success.[79] In response to the FEC's circumvention argument, the Party claimed that donations to parties are relatively small, carrying little, if any, corrupting momentum with them, and that if circumvention were a viable threat, the First Amendment demands a response better tailored to that threat than a limitation on party spending.[80]

74. *Id*.

75. *See* Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm., 213 F.3d 1221 (10th Cir. 2000).

76. *See id*. at 1232. "[Section] 441a(d)(3)'s limit on party spending is not closely drawn to the recognized governmental interest but instead constitutes an unnecessary abridgment of First Amendment freedoms." *Id*. at 1233 (internal citations and quotations marks omitted).

77. *Id*. at 1232-33 (quoting Buckley v. Valeo, 424 U.S. 1, 20 (1976)).

78. *Colorado II*, 121 S. Ct. 2351, 2361 (2001). The threat that the FEC perceived was one of circumvention: "Individuals and nonparty groups who have reached the limit of direct contributions to a candidate give to a party with the understanding that the contribution to the party will produce increased party spending for the candidate's benefit." *Id.*

79. *Id*. at 2362.

80. *Id.* at 2369. The party even offered two suggestions: First, using the earmarking provision of § 441a(d)(8), which provides that contributions that "are in any way earmarked or otherwise directed through an intermediary or conduit to [a] candidate" are treated as contributions to that candidate. 2 U.S.C. § 441a(d)(8) (1994); *Colorado II*, 121 S. Ct. at 2369.

B. The Majority Opinion

After *Colorado I*, the opinions of six of the nine justices were clear: four would find restrictions on coordinated expenditures in the Party Expenditure Provision unconstitutional, while two would uphold the limits. [81] Justices Breyer, Souter and O'Connor became the swing votes and all three decided to uphold the limits on coordinated expenditures, reversing the decisions reached in the lower courts.[82]

Justice Souter wrote the majority opinion. Two issues needed answering. The first, Souter framed as whether a political party is otherwise in a different position from other political speakers, giving it a claim to demand a generally higher standard of scrutiny before its coordinated spending was limited?[83] The second was whether a serious threat of abuse existed when a party made unlimited coordinated expenditures?[84]

1. Exacting Scrutiny is Appropriate

To reach a conclusion on the former issue, the majority addressed two questions: (1) does limiting coordinated spending impose a unique burden on parties; and (2) is there a reason to think that a party's coordinated spending raises the risk of corruption posed when others spend in coordination with a candidate?[85]

The Court found that the limitations imposed on the parties did not cause them to suffer a unique burden under the First Amendment and that a party's spending did pose a greater risk of corruption; it articulated three reasons for ruling this way.[86] First, the Court took the position that the parties and their candidates are not so "joined at the hip" that most of its spending must be coordinated.[87] Second, the party does not only serve the role of electing candidates, they also "act as agents for spending on behalf of those who seek to produce obligated officeholders."[88] Because parties are able to raise large

Second, the party recommended replacing limits on a party's coordinated expenditures with limits on contributions to parties, which imposes a lesser First Amendment burden. *Id*. at 2370.

81. Justices Kennedy, Thomas and Scalia, along with Chief Justice Rehnquist, argued in *Colorado I* for finding the limits unconstitutional, while Justices Stevens and Ginsburg found constitutional all limits on political party spending.

82. *See Colorado II*, 121 S. Ct. 2351, 2351 (2001).

83. *Id*. at 2360.

84. *Id.*

85. *Id.*

86. *Id.* at 2362.

87. *Colorado II*, 121 S. Ct. 2351, 2363 (2001). The Court noted that thirty years of history have proven otherwise, because coordinated spending by a party committee in a given race has, ever since the Act was amended in 1974, been, in fact, limited by the provision being challenged. *Id*. To argue that coordinated spending beyond the limits is essential to the functioning of the party would be to say that political parties have not been functional for over three decades. *Id.*

88. *Id.* at 2364. The Court also stated:

amounts of money and spend it intelligently, individuals and PACs may use parties to undermine the contribution limits that apply to them.[89] Finally, parties are no different from other political spenders; individuals and PACs with large amounts of money could coordinate with candidates just as parties do, and under the FECA they would be subject to coordinated spending limits.[90]

The above three points led the Court to the conclusion that the parties should be subject to the same scrutiny applied to other political actors before their coordinated expenditures are restricted. The Court applied exacting scrutiny; the same standard applied in *Buckley*, and asked, "whether the restriction is 'closely drawn' to match what [they] have recognized as the 'sufficiently important' government interest in combating political corruption."[91]

2. There is a Substantial Threat of Abuse from Unlimited Coordinated Party Spending

In deciding the second issue, the Court focused its attention on circumvention of valid contribution limits and claimed that unlimited coordinated party spending increases the risk of circumvention.[92] The opinion

> It is this party role, which functionally unites parties with other self-interested political actors, that the Party Expenditure Provision targets. This party role, accordingly, provides good reason to view limits on coordinated spending by parties through the same lens applied to such spending by donors . . . that can use parties as conduits for contributions meant to place candidates under obligation.

Id.

89. *Id.* at 2365. The Court asked:

> If the coordinated spending of other, less efficient and perhaps less practiced political actors can be limited consistently with the Constitution, why would the Constitution forbid regulation aimed at a party whose very efficiency in channeling benefits to candidates threatens to undermine the contribution (and hence coordinated spending) limits to which those other actors are unquestionably subject?

Id.

90. *See id.* at 2365-66. The Court also said that the parties, although not in a unique position from some individuals and PACs, do have an advantage because under the Party Expenditure Provision, parties are allowed to spend more in coordination with a candidate than other actors. *See id*. at 2366.

91. *Id*. at 2366 (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 387-388 (2000)).

92. *See Colorado II*, 121 S. Ct. at 2367. As the Court noted, the Act was in place for thirty years; therefore, no recent experiences with unlimited coordinated spending existed for the Court to consider. *See id*. Instead, the majority determined that because there was evidence under the current laws that candidates, donors and parties test the limits, declaring parties' coordinated spending wide open would induce circumvention and further erode contribution limits. *See id.*

stated, "if suddenly every dollar of spending could be coordinated with the candidate, the inducement to circumvent would almost certainly intensify."[93]

The Court also addressed the two alternatives that the Party suggested to limiting its coordinated expenditures to prevent circumvention. In response to the Party's claim that the earmarking provision of § 441a(d)(8) would prevent circumvention, the Court said that it would reach "only the most clumsy attempts to pass contributions through to candidates."[94] In regards to the Party's second suggestion, that Congress limit contributions to parties, the Court replied that "the choice is between limiting contributions and limiting expenditures whose special value as expenditures is also the source of their power to corrupt"[95] and Congress is entitled to choose which to limit.[96]

The majority thus upheld restrictions on a party's coordinated spending to minimize circumvention of contribution limits constitutional.[97]

C. The Dissent

As in *Colorado I*, Justice Thomas filed a dissenting opinion in *Colorado II*, and Justices Kennedy and Scalia joined him.[98] Thomas cited three reasons for rejecting the majority's conclusion: (1) the Party Expenditure Provision swept too broadly; (2) it interfered with the party-candidate relationship; and (3) no proof existed that it was necessary to combat corruption.[99]

93. *Id.* at 2368. The Court offered an example to illustrate the possibility of circumvention. It said that if a candidate could arrange for a party committee to foot his bills, to be paid with $20,000 contributions to the party by his supporters, the number of donors necessary to raise $1,000,000 could be reduced from 500 to 46. *Id*. at 2368. This, of course, would be too obvious, but the example illustrated the "undeniable inducement to more subtle circumvention." *Id*. at 2368 n.23.

94. *Id*. at 2370.

95. *Id.* at 2371. The opinion discussed the difference between the Court's decision in *Colorado I* and its decision here, noting that in the former instance, the expenditures were not "potential alter egos for contributions," but were independent expenditures, which under *Buckley* deserved "the most demanding First Amendment scrutiny." *Id*. at 2370. According to the Court, the expenditure at issue in *Colorado II* was the functional equivalent of a direct contribution to a candidate, and unlimited coordinated party spending would lead to increased contributions to parties to finance direct spending on a candidate. *See id*. at 2371.

96. *Id*.

97. *Colorado II*, 121 S. Ct. 2351, 2371 (2001).

98. Chief Justice Rehnquist joined Part II of the dissent.

99. *See Colorado II*, 121 S. Ct. at 2371 (Thomas, J., dissenting). Citing to his opinion in *Colorado I*, Justice Thomas again noted that he would overrule *Buckley* and apply strict scrutiny. *See id.* Under that standard, he argued, this provision could not survive. *See id.* at 2372. He continued, stating, "I remain baffled that this Court has extended the most generous First Amendment safeguards to filing lawsuits, wearing profane jackets, and exhibiting drive-in movies with nudity, but has offered only tepid protection to the core speech and associational rights that our Founders sought to defend." *Id.*

1. The Provision is Too Broad and Disrupts the Party-Candidate Relationship

In addressing the first two points listed above, Thomas argued that the majority reached two flawed conclusions: first, that coordinated expenditures by political parties are no different from contributions, and, second, that political parties are no different from other political actors, for example, PACs and individuals. With regards to the majority's first "flaw," the dissent suggested that some party expenditures that the majority would consider "coordinated" actually resemble independent expenditures, and should be entitled to the same protections.[100] These "coordinated expenditures," argued Thomas, constitute more than a "'general expression of support for the candidate and his views,' [but served] as a communication of 'the underlying basis for the support.'"[101]

Justice Thomas adopted the words from Justice Kennedy's concurrence in *Colorado I* to discuss the second flawed conclusion the majority reached.[102] He argued that the *Buckley* distinction between contributions and expenditures cannot apply when the source of the funds is a political party.[103] According to Thomas, because the successes and failures of a party are directly related to getting its candidates elected, it is only natural for a party to work with and to coordinate its efforts with its candidates.[104] Furthermore, the opinion suggested that forcing a party to maintain independence from its candidate to ensure that all spending is not coordinated and, therefore, restricted, creates various problems for a party.[105]

Yet, Thomas focused his dissent on the fact that, even if the Court felt bound to follow *Buckley's* exacting scrutiny, the Party Expenditure Provision was unconstitutional. *See id.* at 2371. "Even under *Buckley*, which described the requisite scrutiny as 'exacting' and 'rigorous,' the regulation cannot pass constitutional muster." *Id.* at 2372 (quoting Buckley v. Valeo, 424 U.S. 1, 16 (1976)).

100. *Id*. The dissent offered an example of this: a party develops an ad campaign for television touting a candidate's record on education, and the party simply "consult[s]" with the candidate regarding the time slot. *Id*. at 2373. While the statute would consider this coordinated, Thomas saw "no constitutional difference between this expenditure and a purely independent one." *Id*.

101. *Id*. at 2373 (quoting Buckley v. Valeo, 424 U.S. 1, 21 (1976)).

102. *See id.* ("Political parties and their candidates are 'inextricably intertwined' in the conduct of an election.") (quoting *Colorado I* , 518 U.S. 604, 630 (1996) (Kennedy, J., concurring in the judgment and dissenting in part)).

103. *See id.* ("Restricting contributions by individuals and political committees may, under *Buckley*, entail only a 'marginal restriction,' . . . but the same cannot be said about limitations on political parties.") (citation omitted).

104. *See Colorado II*, 121 S. Ct. 2351, 2373 (2001) (Thomas, J., dissenting).

105. *See id*. at 2374. Thomas further acknowledged that to maintain some independence a national party would have to establish separate entities that made independent expenditures. *Id*. at 2374. This independence could create voter confusion and might undermine the candidate that

2. The Party Expenditure Provision Does Not Prevent Corruption

Justice Thomas' other reason for dissenting rested on his belief that the government failed to present sufficient evidence to demonstrate that a party's coordinated expenditures lead to corruption or that the restriction is closely drawn to prevent this corruption.[106] He argued that even if the government had concrete evidence of corruption through circumvention, "better tailored alternatives" existed to address that type of corruption.[107] Thomas agreed with the Party's two suggestions, noting that either enforcement of the earmarking provision in § 441a(d)(8) or, in the alternative, lowering the cap on contributions to political parties while allowing the party to spend without restriction, would be an appropriate remedy.[108] Thomas concluded that "it makes no sense to contravene a political party's core First Amendment rights because of what a third party might unlawfully try to do. Instead of broadly restricting political parties' speech, the Government should have pursued better-tailored alternatives for combating the alleged corruption."[109]

IV. ANALYSIS

In his dissent, Justice Thomas argued that the majority reached flawed conclusions in its decision to uphold the limits on political parties' coordinated expenditures. The real problem in *Colorado II* was not the majority's conclusions, but rather the reasoning behind those conclusions. *Colorado II* left much to be desired in part because the majority did not give sufficient consideration to two important points. First, the majority's decision in *Colorado II* deviated from the reasoning set out in *Buckley*, resulting in a tension between the two opinions as well as significant inconsistencies. Second, the Court attached no importance to the unique role that political parties play in American society, and avoided an examination of both the integral part they play in the structure of democracy and the status they are granted under the Constitution.

the party sought to support. *See id.* These extra burdens illustrate that limitations on a party's coordinated expenditures restrict the party's ability to perform its primary function. *See id.*

106. *Id.* at 2376. The dissent did recognize that preventing corruption is a sufficient interest, but noted that Congress' intent in writing the Party Expenditure Provision was not to prevent corruption, but rather "for the constitutionally insufficient purpose of reducing what it saw as wasteful and excessive campaign spending." *Id.* at 2376-77.

107. *Id.* at 2379-80.

108. *Id.* at 2380. For an explanation of the earmarking provision, see *supra* note 80 and accompanying text. Thomas argued that these two alternatives direct the speech restriction at the source of the alleged corruption. *Id.* at 2380. He said that "'[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it.'" *Id.* (quoting Bartnicki v. Vopper, 121 S. Ct. 1753, 1762 (2001)).

109. *Colorado II*, 121 S. Ct. at 2380.

A. Tension Between Buckley and Colorado II

When comparing *Buckley* and *Colorado II*, two basic points of tension become obvious. First, *Buckley* held that the Constitution did not permit the FEC to limit the amount of money a candidate spent out of his own personal or family accounts.[110] Yet, in *Colorado II*, the majority upheld the limitations on a party's spending in coordination with its candidate because it found there was a sufficient threat of corruption, and that the restrictions on a political party's coordinated expenditures in no way frustrated the First Amendment rights of political parties.[111] In making this finding, the Court failed to recognize the unique relationship that exists between the party and its candidates: a relationship that results in the two being "virtual alter egos."[112]

Second, *Buckley* held that there must be a substantial governmental interest in preventing corruption or the appearance of corruption to justify limiting the First Amendment rights of speech and association—the two core First Amendment freedoms at issue in both *Buckley* and *Colorado II*. The majority in *Colorado II*, however, found the restrictions constitutional despite the fact that the government presented no evidence that the Party Expenditure Provision prevented either actual or potential corruption.

1. The Party is Not a Mere Contributor

The Court's decision in *Colorado II* results in political parties being treated like any other contributor, such as PACs and individuals. The party, however, has a very different relationship with candidates than do other contributors, and because of this, a party's spending on a candidate's election could be equated to a candidate spending his personal funds, a possibility the majority in *Colorado II* never considered.

In the context of an election, the party and its candidates are "inextricably intertwined."[113] This argument was made in an opinion from the Eighth Circuit Court of Appeals, in a case decided in between the Supreme Court's rulings in *Colorado I* and *Colorado II*.[114] In *Missouri Republican Party v. Lamb*, the Eighth Circuit held that a Missouri statute limiting the amount of cash and in-kind contributions that political parties may give to a candidate for public office violated the First Amendment.[115] In writing for the court, Judge Morris Shepherd Arnold argued that distinguishing the party from its candidate

110. Buckley v. Valeo, 424 U.S. 1, 53 (1976).

111. *See Colorado II*, 121 S. Ct. at 2351.

112. Mo. Republican Party v. Lamb, 227 F.3d 1070, 1072 (8th Cir. 2000).

113. *Colorado I*, 518 U.S. 604, 630 (1996) (Kennedy, J., concurring in the judgment and dissenting in part) ("The party's form of organization and the fact that its fate in an election is inextricably intertwined with that of its candidates cannot provide a basis for the restrictions imposed here."). *See Colorado II*, 121 S. Ct. at 2373 (Thomas, J., dissenting).

114. *See Lamb*, 227 F.3d at 1070.

115. *See id*. at 1071.

is, at the least, a difficult task.[116] He noted that the principal way that parties express themselves is through the speech of their candidates, and that, at times, the parties and their candidates are "virtual alter egos."[117] Furthermore, the opinion argued that the main object of a political party is to get its candidates elected to office, so the speech of its candidates is also its own speech.[118]

The reason that a political party focuses so much attention on electing candidates is that parties exist to develop and promote a platform; a party has an agenda and goals that it seeks to further. It does this by nominating candidates who, throughout the election, will be identified with that party.[119] The positions of the party are the essence of that party, and it seeks to elect candidates that adhere to a core set of beliefs that furthers the party's position.[120] The success or failure of a party is directly related to the election of its candidates; if a candidate wins, his party also wins.[121] Therefore, the close ties that exist between a political party and its candidates require that they be able to coordinate; coordination is not just one of many freely available options for party expression, it is really the only way a candidate and party can work towards achieving their common goals.[122]

The real problem is that the Court treated the party as another contributor, putting it on the same level as an individual or PAC. In reality, however, the parties are really separate actors similar to the candidates themselves. Parties are not in place merely to contribute money to a candidate's campaign, they exist to further their own political agendas, and to do that, they nominate candidates and assist those candidates in getting elected.[123] In light of the fact

116. *See id.* Arnold went even further with this argument, saying that often the party and its candidate are virtually indistinguishable from each other, and their identities are merged in a way that makes dealings between them more than merely transient symbiotic ones between separate and distinct entities. *Id.* at 1072.

117. *Id.*

118. *Id.*

119. *See Colorado I*, 518 U.S. 604, 629 (1996) (Kennedy, J., concurring in the judgment and dissenting in part). Justice Kennedy recognized that a party has traditions and principles that may transcend the interests of individual candidates, but in the context of an election, candidates are absolutely necessary in getting the party's message out, and parties are necessary to get the candidate's message known. *Id.*

120. *See* Peter J. Wallison, *It's Not Corruption, It's Politics*, WASH. POST, June 3, 2001, at B1.

121. *See Colorado II*, 121 S. Ct. 2351, 2373 (2001) (Thomas, J., dissenting).

122. *See* Respondent's Brief at 25, *Colorado II*, 121 S. Ct. 2351 (2001) (No. 00-191). The Respondents in *Colorado II* further argued that, "[f]or a political party, entering in a working relationship with a candidate is not just one of a range of equally available options. To the contrary, party candidates exist because parties nominate them, and from the moment a party makes a nomination, a natural, strong, and unique tie is established." *Id.* at 26.

123. *See* Nahra, *supra* note 12, at 102 (noting that the party can only fulfill its goals and express its opinions through its candidates). *See also* Marsh, *supra* note 20, at 954 (noting that "the object of the party is to elect its candidates for office").

that parties are separate actors, not mere contributors, a strong argument exists for treating parties the same as candidates, with the restrictions placed on the amount of money that can be contributed to the party, not on the amount that the party can spend.

The justification for not allowing limits on the amount that a candidate can spend from his own personal funds is that there is no substantial threat of corruption. The same holds true in the case of political parties spending in coordination with their candidates. Just as with a candidate, the use of party funds "reduces the candidate's dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse to which the Act's contribution limits are directed."[124]

2. The Threat of Corruption is Not Substantial

In *Buckley*, the Court held that the only justification for limiting core First Amendment protections is a substantial threat of corruption.[125] Yet, in *Colorado II*, the Court upheld the restrictions on political parties with little evidence of corruption; in fact, the Court relied on pure speculation in reaching its conclusion.

Not only has the Court recognized the threat of corruption as the only legitimate reason for upholding limits on contributions, it defines this corruption as an explicit quid pro quo arrangement.[126] As discussed above, a valid threat of a party corrupting its candidates does not exist. Parties and candidates work together for a common goal; the party does not need to exert influence over its candidates. Parties choose candidates who, at least to some extent, have shown agreement with that party's views.[127] This, however, is not the kind of corruption that the Court spoke of in *Colorado II*. Instead, it saw a substantial threat of circumvention of other contribution limits warranting limits on the Party's coordinated expenditures. The situation that the Court contemplated in *Colorado II* was as follows: an individual makes the maximum direct contribution to a specific candidate that is allowed under the

124. Buckley v. Valeo, 424 U.S. 1, 53 (1976). *See* Nahra, supra note 12, at 102. In his opinion in *Colorado I*, Justice Thomas also noted that if a party spends large amounts of money on the election of one of its candidates, that candidate wins, takes office and implements the parties' platform that is not corruption; rather that is "successful advocacy of ideas in the political marketplace and representative government in a party system." 518 U.S. at 646 (Thomas, J., concurring in the judgment and dissenting in part).

125. *Buckley*, 424 U.S. at 26. The Court also reaffirmed this position in *Federal Election Commission v. National Conservative PAC*, 470 U.S. 480 (1985) [hereinafter *NCPAC*]. *See also* Nahra, *supra* note 12, at 102. Nahra noted that in *NCPAC* the Supreme Court reemphasized that preventing corruption or the appearance of corruption was the only legitimate rationale for limiting the exercise of fundamental First Amendment rights in the context of a campaign. *Id*. (citing *NCPAC*, 470 U.S. at 500-501).

126. *See* Nahra, *supra* note 12, at 102 (citing *NCPAC*, 470 U.S. at 497).

127. *See id.* at 105.

Act and then, still wanting to give more to that candidate, the individual contributes money to that candidate's political party, with the understanding that the money is to go towards that candidates' election.[128]

Although one can see how circumvention of other contribution limits might occur, the fact remains that the Court had little, if any, proof that it would occur. In arguing that a substantial threat of corruption did exist, the Court could only point to a system the Democratic Party used, commonly known as tallying.[129] Tallying is basically an informal agreement that if a candidate helps the Democratic Senatorial Campaign Committee (DSCC) raise funds the DSCC will, in turn, help the candidates' campaign.[130] The majority found that this process of tallying was "a sign that contribution limits are being diluted and could be diluted further if the floodgates were open."[131] Yet, given the relationship between the party and its candidates and the fact that in an election the two are working not just for themselves but also for each other, it hardly seems unreasonable that a party would make an agreement that if a candidate helps it, it will help the candidate. The Court also suggested that because a candidate could expect his donation from the DSCC to be related to how much he raised for the DSCC that this would lead to corruption.

The problem with the Court's rationale is that there was no proof that the candidates knew who donated the money to the DSCC and how much each individual gave. As previously noted, the corruption that the Court has recognized as sufficient to uphold the contribution limits is a quid pro quo arrangement, which does not present a problem when a party gives money to its candidate. Similarly, a party giving the money it raised from individuals to a candidate raises no threat of a quid pro quo arrangement unless the candidate knows who contributed the money to that party. The fact that a candidate receives an amount from the party in proportion to what he raises for the party does not by itself lead to corruption.

Furthermore, even if circumvention is a substantial threat, the Court should have given more consideration to the alternatives available to limiting the speech of political parties, organizations that, by their own right, do not pose a threat of corruption. As the dissent and the Party noted, two alternatives exist. The first involves a provision in the FECA itself, known as the earmarking provision. This provision makes it illegal for an individual to donate money to a party for use on a specific candidate's campaign.[132] It appears that this provision is a direct solution to the problem of circumvention. The majority,

128. *See Colorado II*, 121 S.Ct. 2351, 2367 (2001).

129. *See id.* at 2368.

130. *See id.* In its discussion on tallying, the majority relied on declarations by various individuals in the Democratic Party.

131. *Id.* at 2368 n.22. The Court suggested that the obvious reason for tallying was that the party wants to know who gets the benefit of the money raised by the party. *Id.*

132. *See* 2 U.S.C. § 441a(a)(8) (1994).

however, dismissed it as a rule that "would reach only the most clumsy attempts to pass contributions through to candidates."[133] As the dissent pointed out, however, the Court provided no evidence that this rule did not address the problem at hand. The other alternative available is to lower the amount that an individual can contribute to a political party, rather than limiting the amount that a party could spend in coordination with its candidates. If a threat of corruption through circumvention does exist, aiming the remedy directly at the culprits, individuals and PACs, is a more appropriate and direct measure than denying a political party its First Amendment rights.

B. The Role of Political Parties in the United States

Figuring out exactly what the role of political parties entails in American society is a difficult task, and one that well exceeds the bounds of this Note. No matter how their role is defined, however, one thing remains clear: political parties are an important force in the politics of the United States. Therefore, the distinction between contributions and expenditures first articulated in *Buckley*, and ever-present in the Supreme Court's campaign finance cases, cannot withstand a challenge by a political party. In other words, the Court's ruling in *Buckley*, that limits for individuals and political committees were constitutional because they imposed only a "marginal restriction" on the rights of freedom of speech and association, did not contemplate contributions from political parties. Yet, in *Colorado II*, the Court never considered that while the above may hold true for mere contributors, limits on political party contributions, or coordinated expenditures, might impose a greater burden. The majority's failure to consider this possibility reflects an even larger oversight on its part: the Court did not attach any significance to either the status of parties under the Constitution or the role that parties play in furthering the goal of democracy set out in the Constitution.

1. The Constitutional Status of Parties

It is no secret that the Framers of the Constitution feared parties, and that parties are not mentioned in the Constitution.[134] While there were many ideas the Framers could not agree on, they did share "a common conviction about

133. *Colorado II*, 121 S. Ct. at 2370.

134. *See* Harvey C. Mansfield, Jr., *Political Parties and American Constitutionalism*, *in* AMERICAN POLITICAL PARTIES AND CONSTITUTIONAL POLITICS 1 (Peter W. Schramm & Bradford P. Wilson eds., 1993). The author notes, however, that America is not unique for leaving parties out of its constitution; most free countries do not mention parties in their constitutions. *Id*. Yet, in the case of the United States Constitution, it is true that the original version did not imagine that there would be political parties. One commentator even noted that the Founders "feared and despised political parties." James A. Gardner, *Can Party Politics Be Virtuous?*, 100 COLUM. L. REV. 667, 667 (2000).

the baneful effects of the spirit of the party."[135] In fact, in *The Federalist No. 10*, James Madison's hostile opinions of permanent political parties are quite evident.[136] George Washington also warned against them in his Farewell Address, and Alexander Hamilton said that the Constitution's goal was "to abolish factions, and to unite all parties for the general welfare."[137]

Part of the problem that the Framers had with parties, however, was that they viewed parties as the same thing as factions, when in fact the two are different.[138] One scholar noted that political parties today are "parties of principle," while factions are "parties of interest."[139] It was the latter that the Framers really feared, but because they used the two terms interchangeably, political parties were also suspect.[140] While the Framers feared parties, or factions, even Madison recognized that the causes of faction—differing opinions, passions, and interests—could not be removed. Therefore, the idea was to find a way to control the effects of faction, rather than prevent them entirely.[141]

Despite this fear of political parties that the Framers expressed, political parties soon became "a part of the machinery of government in a manner that went well beyond Madison's resigned acceptance of them as evils that would always be there."[142] Ironically, the very people who warned of the evils of political parties were at the forefront of the rise of the party, so that the

135. Petitioner's Brief at 39, *Colorado II*, 121 S. Ct. 2351 (2001) (No. 00-191). *See* RICHARD HOFSTADTER, THE IDEA OF A PARTY SYSTEM 2 (1969). Hofstadter commented further that the Framers all seemed to agree that an effective constitution would be one that successfully counteracted the work of parties. *Id*. at 53.

136. Mansfield, *supra* note 134, at 5. Madison argued in favor of a republic; he thought that America should be governed by a majority faction, but instead of factions fixed in parties organized for a long life, he anticipated temporary, shifting coalitions. *See generally* THE FEDERALIST NO. 10 (James Madison).

137. Gardner, *supra* note 134, at 667 (quoting Alexander Hamilton in 2 THE DEBATES IN THE SEVERAL STATES: CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 320 (Jonathan Elliot, ed., Hein & Co. reprint ed. 1996)).

138. *See* DEAN MCSWEENEY & JOHN ZVESPER, AMERICAN POLITICAL PARTIES 7 (1991); HOFSTADTER, *supra* note 135, at 64 (noting that Madison used the words party and factions as synonyms).

139. MCSWEENEY & ZVESPER, *supra* note 138, at 7. Madison defined faction as: "[A] number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to he permanent and aggregate interests of the community." *Id.* (quoting THE FEDERALIST NO. 10 (James Madison)). *See also* HOFSTADTER, *supra* note 135, at 65 n.26 (noting that Edmund Burke defined "party" as based on principles at aiming to advance common interests, while Madison defined both "party" and "faction" as passions and interest aimed at threatening the general welfare).

140. MCSWEENEY & ZVESPER, *supra* note 138, at 7.

141. HOFSTADTER, *supra* note 135, at 66. Madison felt that plurality and variety would prevent the emergence of a cohesive and oppressive majority. *See id*. at 67.

142. *Id.* at 70.

formation of national political parties and the formation of the republic were almost concurrent.[143] Over the years, political parties have become the force that drives the Constitution, enabling it to remain a working document.[144]

Although it is clear that the Framers did not intend to give constitutional significance to the parties, Article III, as well as amendments to the original document, suggests that parties do have constitutional status. While parties are still not mentioned in the Constitution, the passage of the Twelfth and Twenty-fifth Amendments suggests that the Constitution recognizes their importance.[145]

The Twelfth Amendment, passed in 1804, states, in pertinent part, that:

> The Electors shall meet in their respective states and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President.[146]

This amendment provided for separate elector votes for President and Vice-President. Prior to its passage, Article II had governed the election, stating that:

> The Electors shall meet in their respective States, and vote by Ballot for two Persons . . . . The Person having the greatest Number of Votes shall be the President . . . . [a]fter the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice-President.[147]

Under Article II, it was possible that the President and Vice-President would not be from the same party, and this, in fact, happened in 1796 when John Adams, a Federalist, became President, and Thomas Jefferson, a Democratic-

143. *See* Petitioner's Brief at 41, *Colorado II*, 121 S. Ct. 2351 (2001) (No. 00-191) (quoting Cal. Democratic Party v. Jones, 530 U.S. 567, 574 (2000)).

144. HOFSTADTER, *supra* note 135, at 70. Hofstadter quoted Lord Bryce:

> The whole machinery, both of national and State governments, is worked by political parties. . . . The spirit and force of party has in America been as essential to the action of the machinery of government as steam is to a locomotive engine. . . . The actual working of party government is not only one of full interest and instruction, but is so unlike what a student of the Federal Constitution could have expected or foreseen, that it is the thing of all others which anyone writing about America ought to try to portray.

Id. (quoting 1 JAMES BRYCE, THE AMERICAN COMMONWEALTH 6 (3d ed. 1897); 2 *id*. at 3, 4)). *See* Mansfield, *supra* note 134, at 4 (noting that we should not be surprised that while parties are not mentioned in the Constitution, they are necessary to the working of the Constitution).

145. One scholar has argued that the Constitution cannot mention parties because:"The American Constitution confines itself to formal statements of the powers and terms of its offices, not prescribing how they are to be exercised. . . . If [parties] were mentioned in the Constitution . . . [parties] would have had to be described formally . . . ." Mansfield, *supra* note 134, at 2.

146. U.S. CONST. amend. XII.

147. U.S. CONST. art. II, § 1.

Republican, became the Vice-President.[148] After this election, many became convinced that an amendment was needed to require separate ballots for President and Vice-President.[149] This need became even more apparent after the turbulent election of 1800, in which Jefferson, again a Presidential candidate, and his running mate, Vice-Presidential candidate Aaron Burr, received the same number of votes throwing the decision into the House of Representatives.[150]

By providing for the separate election of the President and Vice-President, the Twelfth Amendment acknowledged the role of partisanship in the electoral process.[151] No longer could the President and Vice-President come from different parties; instead, electors would not only vote for candidates, but also for parties. As Lloyd Cutler put it:

> [T]he Constitution [, under the Twelfth Amendment,] requires voters to vote for electors who normally cast their ballots for one party's presidential and vice-presidential candidates as a team. In 1984, it was not possible to vote for Reagan and Ferraro, or for Mondale and Bush.[152]

Similarly, the Twenty-Fifth Amendment also gave constitutional status to the parties. The Amendment, passed in 1967, addresses presidential succession, presidential disability, and vice-presidential replacement.[153]

148. *See* William Josephson & Beverly J. Ross, *Repairing the Electoral College*, 22 J. LEGIS. 145, 154 (1996). In that election, John Adams, the Presidential candidate from the Federalist party, received three more votes than Thomas Jefferson, the Democratic-Republican Presidential candidate. However, a large number of Federalist electors did not cast their votes for the Federalist's Vice-Presidential candidate, Thomas Pinckney, so that Jefferson was elected Vice President. *Id*.

149. *See id*. at 155.

150. *See* Victor Williams & Alison M. MacDonald, *Rethinking Article II, Section 1 and Its Twelfth Amendment Restatement: Challenging Our Nation's Malapportioned, Undemocratic Presidential Election Systems*, 77 MARQ. L. REV. 201, 202-03 (1994). *See also* Josephson & Ross, *supra* note 148, at 155 ("Because the Federalists had lost the vice presidency in 1796, the Republican electors in 1800 were afraid or unwilling to chance a similar result.").

151. *See* MCSWEENEY & ZVESPER, *supra* note 138, at 40. *See also* Charles R. Kesler, *Political Parties, The Constitution, and the Future of American Politics, in* AMERICAN POLITICAL PARTIES AND CONSTITUTIONAL POLITICS 233 (1993) (noting that the "single constitutional change needed to accommodate political parties was the Twelfth Amendment, which in effect transferred from the electoral college to political parties many of the deliberative functions integral to presidential selection").

152. Lloyd N. Cutler, *Party Government Under the American Constitution*, 134 U. PA. L. REV. 25, 39 n.70 (1985).

153. *See* U.S. CONST. amend. XXV; George Anastoplo, *Amendments to the Constitution of the United States: A Commentary*, 23 LOY. U. CHI. L.J. 631, 828 (1992). *See also* John D. Feerick, *The Twenty-Fifth Amendment: An Explanation and Defense*, 30 WAKE FOREST L. REV. 481, 489 (1995). Feerick noted that the need for this amendment was realized after President Dwight Eisenhower suffered a heart attack and Vice-President Richard Nixon attended to the President's affairs while he recovered. *Id*. Although this worked out well at the time, had the

Prior to the passage of the Twenty-Fifth Amendment, succession to the presidency when the office of Vice-President was vacated was prescribed by an act of Congress.[154] This usually meant that the Speaker of the House was

country been in a serious international crisis, this system would not have worked. The Twenty-Fifth Amendment states the following:

> Section 1. In case of the removal of the President from office or of his death or resignation, the Vice President shall become President.
>
> Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.
>
> Section 3. Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.
>
> Section 4. Whenever the Vice President and a majority of either the principal officers of the executive departments or of such other body as Congress may by law provide, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.
>
> Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office. Thereupon Congress shall decide the issue, assembling within forty-eight hours for that purpose if not in session. If the Congress, within twenty-one days after receipt of the latter written declaration, or, if Congress is not in session, within twenty-one days after Congress is required to assemble, determines by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office, the Vice President shall continue to discharge the same as Acting President; otherwise, the President shall resume the powers and duties of his office.

U.S. CONST. amend. XXV.

154. *See* Anastaplo, *supra* note 153, at 828; *See also* U.S. CONST. art. II, §1, cl. 6. This clause states:

> In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

Id.

next in line, but this made it possible for the Presidency to shift from one political party to another.[155] The Twenty-Fifth Amendment, however, provides a procedure for filling a vacancy in this situation, thus reducing the possibility of resorting to the statutory line of succession.[156]

Yet, parties did not only obtain constitutional status through the passage of amendments. The original document also elevated the status of the party through a theory known as "partisan entrenchment."[157] In an article entitled *Understanding The Constitutional Revolution*, Jack Balkin and Sanford Levinson suggest that political parties help bring about constitutional revolutions and changes in American constitutional law.[158] The argument is that over time, the Constitution changes because of Article III interpretation, and the party, through presidential appointments to the judiciary, plays a role in this change.[159]

> When a party wins the White House, it can stock the federal judiciary with members of its own party, assuming a relatively acquiescent Senate. . . . [Federal judges] are temporally extended representatives of particular parties, and hence, of popular understandings about public policy and the Constitution. The temporal extension of partisan representation is what we mean by partisan entrenchment.[160]

In other words, a political party is able to place its own members in the federal judiciary, and when enough members of a particular party are appointed to the federal judiciary, they start to change the understandings of the Constitution.[161] "Parties who control the presidency install jurists of their liking. . . . Those jurists in turn create decisions which are embodied in constitutional doctrine and continue to have influence long after those who nominated and confirmed the jurists have left office."[162] Therefore, parties attain a status under the Constitution by way of their ability to affect the interpretations of it through presidential appointments of Article III judges.

In sum, political parties, though not mentioned in the Constitution, do obtain constitutional status by way of the Twelfth and Twenty-Fifth Amendments, as well as through presidential appointments. Through these provisions, the Constitution recognizes that parties are extensions of the candidates. One cannot exist without the other. In *Colorado II*, however, the Court failed to recognize the significance the Constitution attaches to the party.

155. *See* Anastoplo, *supra* note 153, at 828.

156. *See* Feerick, *supra* note 153, at 498.

157. *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066 (2001).

158. *See id.*

159. *See id.* at 1068.

160. *Id.* at 1067.

161. *Id.*

162. Balkin & Levinson, *supra* note 157, at 1076.

The opinion did not acknowledge or even explore the possibility that parties obtain a special status under the Constitution. The Court failed to see that in upholding the limits on the amount a party could spend in coordination with its candidates, it was preventing the party from performing its constitutional functions.

2. The Role of Parties in Furthering Democracy

Even if one remains skeptical about the notion that parties have a significant constitutional status, it is hard to ignore their influence in furthering the goals of the Constitution, namely in strengthening the ideal of democracy. While scholars have difficulty agreeing on the precise functions of political parties in a democratic society, they all seem to accept the thesis that parties "are indispensable to the functioning of democratic political systems."[163] Preserving the Constitution and promoting its objectives is the touchstone of American political parties; whatever their function—from recruiting and nominating candidates, to encouraging voters to go to the polls—the parties perform it in the name of guarding the Constitution.[164]

In their book, *Political Parties in America*, Frank Sorauf and Paul Allen Beck claim that competitive political parties in every democracy perform at least three functions: (1) they select candidates and contest elections; (2) they propagandize on behalf of a party ideology or program; and (3) they attempt to guide the elected officeholders of government to provide particular policy or patronage benefits.[165] Perhaps the most obvious role of parties is the responsibility they assume in the electoral process and, thus, the campaign process. The process by which political leaders are recruited, elected and appointed to office form the central core of party activity.[166] Since the parties provide campaign services and funds to candidates, they are major players in

163. WILLIAM J. KEEFE, PARTIES, POLITICS, AND PUBLIC POLICY IN AMERICA 30 (7th ed. 1994). *See* CLINTON ROSSITER, PARTIES AND POLITICS IN AMERICA 60 (1960) ("Political parties and democracy are inseparable phenomena"); Nancy L. Rosenblum, *Political Parties as Membership Groups*, 100 COLUM. L. REV. 813, 814 (2000). ("Political parties are the voluntary associations principally committed to making democracy."); Geoffrey M. Wardle, Comment, *Time to Develop a Post-Buckley Approach to Regulating the Contributions and Expenditures of Political Parties*: Federal Election Commission v. Colorado Republican Campaign Committee, 46 CASE W. RES. L. REV. 603, 626 (1996) ("Parties are central to American politics. . . . They are essential elements to overcoming the disassociation Americans have with the political system.").

164. *See* Kesler, *supra* note 151, at 230; Balkin & Levinson, *supra* note 157, at 1077-78 ("Political parties represent the people not only in their views about ordinary politics, but also in their views about the deepest meanings of the Constitution and the country.").

165. FRANK J. SORAUF & PAUL ALLEN BECK , PARTY POLITICS IN AMERICA 12 (6th ed. 1988).

166. KEEFE, *supra* note 163, at 32. *See* ROSSITER, *supra* note 163, at 40 (noting that the parties establish and maintain the machinery that puts men and women in public office, and that parties do this at four key points: nominations, campaigns, elections, and appointments).

both the federal and state campaign processes.[167] In fact, it has been argued that, today, parties are the "single most important player in the federal campaign process." [168] They are no longer known merely for their role as a distributor of the spoils of local government elections; instead, they have become national organizations that focus on providing campaign services.[169] One important campaign service they provide is educating the public; they transmit political values and information to large numbers of current and future voters.[170] They help to educate the voters on issues, provide a linkage between the people and the government, and simplify the choices that voters have to make in elections.[171]

While political parties are a constant in the electoral process, they serve other functions in society as well. For example, educating the public, though it can be considered a campaign service, is also a social function that parties serve.[172] In addition, they act as buffers and adjusters between individuals and society and provide an object to which citizens of the United States can extend allegiance.[173] Parties also serve as groups that people can identify with, become active in, contribute to, work within, become officers of and participate in setting agendas, goals and strategies.[174]

Beck and Sorauf also argue that there are four "indirect consequences" of American party activity that benefit society.[175] First, political parties participate in the social unification of the American electorate; they symbolize and represent a political point of view, offering uninformed or underinformed citizens a map of the political world.[176] Second, American parties contribute to the accumulation of political power.[177] They aggregate masses of political individuals and groups, organizing blocks powerful enough to govern or to

167. *See* Marsh, *supra* note 20, at 963-64.

168. Nahra, *supra* note 12, at 88.

169. *Id*. *See* Marsh, *supra* note 20, at 963.

170. *See* SORAUF & BECK, *supra* note 165, at 15.

171. *See* KEEFE, *supra* note 163, at 33.

172. *See* ROSSITER, *supra* note 163, at 48. For example, Rossiter noted that the Republicans, through President Abraham Lincoln, educated the nation in the true nature and implications of slavery, while the Democratic party, through President Franklin Roosevelt, sought to educate us on the proper relations of private enterprise and public authority. *Id.* at 48.

173. *See id*. at 49-50. In regards to the former role, Rossiter noted that "the parties are still important dispensers of those aids, favors, and immunities . . . that make it possible for men and women to live reasonably confident lives in a harsh environment." *Id.* at 49. Keefe also commented that parties serve as brokers among the organized interests of American society because they help keep group conflicts within tolerable limits. KEEFE, *supra* note 163, at 34.

174. Rosenblum, *supra* note 163, at 817.

175. SORAUF & BECK , *supra* note 165, at 15-16.

176. *Id.*

177. *Id*. at 16.

oppose those who govern.[178] Third, they dominate the recruitment of political leadership.[179] Many individuals in public service entered into such service through a political party, and because parties are present in all levels of the federal government, they are able to recruit and elevate leadership from one level to the next.[180] Finally, parties are a force of unification in the divided American political system.[181] As one author noted, they bring people of diverse political views together; by providing a structure to bring divergent social and ideological groups together, parties limit the destructive impact of factionalism.[182]

Because political parties and PACs provide similar services, it is important to differentiate between the two to understand why political parties deserve to be treated differently than PACs. Beck and Sorauf identified five characteristics of political parties that distinguish them from other political organizations: (1) the extent to which they pursue their organizing through the contesting of elections; (2) the extensiveness and inclusiveness of their organizations and clientele; (3) their sole concentration on political avenues for achieving their goals; (4) their demonstrated stability and long life; and (5) their strength as cues and reference symbols in the decision making of individual citizens.[183] The authors also noted that none of these characteristics alone sets the political parties apart from other political actors, but when taken together, and when the matter of degree is considered, no other political organization matches the political party.[184]

The purpose political parties aim to serve also sets them apart from PACs and other political actors. PACs usually serve a narrow interest in society;

178. *Id*. *See* ROSSITER, *supra* note 163, at 46 (noting that the minority party is expected to organize itself in the legislature for the primary purpose of checking the majority party).

179. SORAUF & BECK, *supra* note 165, at 16.

180. *Id.* ("One needs only to run down a list of the members of the cabinet or even the federal courts to see how many of them entered public service through a political party or through partisan candidacy for office.").

181. *Id. See* Wardle, *supra* note 163, at 627 (noting that parties offer structure that facilitates consensus and overcomes divisiveness).

182. *See* Wardle, *supra* note 163, at 627. Balkin and Levinson also noted that parties are important institutions for translating and interpreting popular will and negotiating among various interest groups and factions. *See* Balkin & Levinson, *supra* note 157, at 1066.

183. SORAUF & BECK, *supra* note 165, at 19. Other authors have noted the uniqueness of political parties. One article argued that only political parties are engaged in recruiting and nominating candidates and educating the public about those candidates and issues for the astonishing number and kind of elective offices at the local, state and federal levels in the United States; no other group takes a similarly comprehensive view of the public interest and political agenda. Rosenblum, *supra* note 166, at 815. The same article stated that only parties "routinely, pervasively, and legitimately exercise influence from within government." *Id.* In addition, the right to be on the election ballot separates political parties from all other political associations. *Id*. at 814-15.

184. *See* SORAUF & BECK, *supra* note 165, at 15.

they have one purpose and want to further only one objective. Political parties, on the other hand, serve multiple purposes, and are not "ideological or narrowly bound to specific views."[185] Parties have to steer a middle course to be able to win or retain office, where other political organizations often advocate only one issue and take one side of that issue, not worrying about appealing to the masses.[186] Because parties are multi-interest groups they stand in a unique position to originate policies and to find a way to broaden the special concerns of others; and their policies are typically more realistic than those that emerge from single-interest political groups.[187]

Developing an exact description of the functions of political parties and their role in society is not necessary. The point is that they "provide a whole bundle of valuable benefits,"[188] and their part in fostering the democratic society in America is extremely important.

Just as the Court failed to recognize the constitutional significance of parties in *Colorado II*, it also neglected to take notice of the role of parties in American society. To achieve the goal of promoting democracy, political parties must elect candidates. In order to elect candidates, however, parties have to be able to spend money. *Buckley* held that contributions, and thus coordinated expenditures, could be limited because they entailed "only a marginal restriction upon the contributor's ability to engage in free communication."[189] On the other hand, restrictions on expenditures were unconstitutional because they represented "substantial rather than merely theoretical restraints on the quantity and diversity of political speech."[190] If the Court in *Colorado II* had considered the role of parties in society, it would have realized that in the context of political parties, the distinction between contributions and expenditures articulated in *Buckley* breaks down.[191]

A political party's spending in coordination with its candidate is the party's only means of communication. Advocating for candidates and putting those candidates in office is how parties speak; to do this they must be able to spend money in coordination with those candidates they seek to elect. Judge Arnold made this point in *Lamb*, in which he argued that it is difficult to say that a political party's contribution "does not communicate the underlying basis for support."[192] He also noted that a party's contributions are not merely

185. Lekich, *supra* note 16, at 1879.

186. *See* Marsh, *supra* note 20, at 967.

187. *See* ROSSITER, *supra* note 161, at 42.

188. Steven G. Calabresi, *Political Parties as Mediating Institutions*, 61 U. CHI. L. REV. 1479, 1530 (1994) (arguing that political parties are invaluable for the work they do in keeping agency costs down and in providing some degree of accountability).

189. Buckley v. Valeo, 424 U.S. 1, 20 (1976).

190. *Id.* at 19.

191. *See* Mo. Republican Party v. Lamb, 227 F.3d 1070, 1072 (8th Cir. 2000).

192. *Id.*

"symbolic expressions"[193] of support; rather they are more like substantive political statements than other's contributions.[194] Judge Arnold also suggested that First Amendment freedoms at stake in *Lamb* were weightier than those involved in *Buckley* because spending on its candidates is the party's speech, not just one avenue for the party to communicate.[195] Yet, the Court in *Colorado II* gave this no consideration. Instead, it upheld the distinction in *Buckley*, and overlooked the idea that in an election, the parties' right to coordinate with their candidates entails much more than a marginal restriction on their First Amendment freedoms.

V. THE MOST RECENT ADDITION TO CAMPAIGN FINANCE REFORM

The 1974 Amendments to the FECA were adopted in response to the Watergate scandal. Similarly, the collapse of Enron, a corporation that made large and continuous contributions to both Republican and Democrat candidates, resulted in the Congress passing, and President George W. Bush signing, new campaign finance legislation.[196] The legislation was a bipartisan effort sponsored by Rep. Christopher Shays (R-Conn.) and Rep. Martin Meehan (D-Mass.). The main provisions of the bill included a ban on unregulated soft money as well as new regulations pertaining to issue ads.[197]

Before the most recent bill was signed into law, campaigns were financed through both soft money and hard money.[198] Hard money was used for election activities expressly advocating the defeat or election of a specific candidate.[199] Soft money, on the other hand, was raised to support get-out-the-vote efforts, party building, grass roots activities, and issue ads—those ads that do not advocate for the election or defeat of a specific candidate.[200] The FECA originally regulated only hard money, while leaving soft money unlimited and unregulated.[201]

193. *Id.* (quoting *Buckley*, 424 U.S. at 21).

194. *Id.*

195. *See id.*

196. Jill Zuckman, *House OKs Bill to Ban Soft Money Donations; Measure Still Needs Approval in Senate*, CHI. TRIB., Feb. 14, 2002, at A1; *see also* Alison Mitchell, *Campaign Finance Bill Wins Final Approval in Congress and Bush Says He'll Sign It*, N.Y. TIMES, Mar. 21, 2002, at A1 (noting that "the new legislation will make the most far-ranging changes since 1974 in how political parties and outside groups participate in campaigns").

197. Charles Lane, *Court Tests Likely for Shays-Meehan; "Issue Ad" Rules Viewed as Vulnerable*, WASH. POST, Feb. 16, 2002, at A4.

198. *See* Zuckman, *supra* note 196, at A1.

199. *See id.*

200. *See id.*

201. *See id.*

The new campaign finance law prohibits parties from raising soft money.[202] Supporters of the law argued that the Supreme Court's decision in *Colorado II* is evidence that the Court would find a soft money ban consistent with *Buckley*.[203] One of the most controversial portions of the new law prohibits certain groups from running issue ads thirty days before a primary and sixty days before a general election.[204] Those who oppose the law argue that under *Buckley* the provision regarding issue ads is unconstitutional.[205]

As one article pointed out, there are winners and losers under the new campaign finance laws.[206] Among the winners are PACs, whose status will be elevated because of the emphasis on smaller, regulated donations.[207] Political parties, on the other hand, are among the losers, as they will lose a large portion of money that has financed many of their activities.[208]

Within hours of the President signing the bill, both the National Rifle Association and Senator Mitch McConnell filed lawsuits challenging the constitutionality of the law.[209] Unfortunately, the opinion in *Colorado II* provides little guidance to either those who support the law or those who oppose it. While one author noted that the Supreme Court, no longer a champion of political speech, would probably uphold the new law,[210] as argued above, the decision in *Colorado II* was inconsistent with the Court's decision in *Buckley*, and leaves open the question of the constitutionality of this new campaign finance reform legislation.

---

202. *See* Mitchell, *supra* note 196, at A1. In exchange for the soft money ban, the limits on hard money were loosened slightly. *See id*. Under the new law, individuals can give a federal candidate $2000 as opposed to the current limit of $1000. *See id.* Furthermore, the aggregate limit an individual can give to all federal candidates and political parties will rise from $25,000 a year to $95,000 for each two-year election cycle. *Id.*

203. *Id*.

204. Alison Mitchell, *House G.O.P. Proposes Rival to Campaign Finance Bill*, N.Y. TIMES, Feb. 13, 2002, at A26.

> Lawyers on both sides of the debate say the most vulnerable part of the bill is probably its "issue ad" provision, which applies disclosure rules and contribution limits to TV and radio advertising—paid for by corporations, unions and independent advocacy groups—that "refers" to federal candidates in the weeks immediately before a primary or general election.

Lane, *supra* note 197, at A4.

205. *See id.*

206. Jim Drinkard, *Some Win, Some Lose with Changes*, USA TODAY, Mar. 19, 2002, at 2A.

207. *Id.*

208. *Id.*

209. Elisabeth Bumiller & Philip Shenon, *President Signs Bill on Campaign Gifts; Begins Money Tour*, N.Y. TIMES, Mar. 28, 2002, at A1.

210. D. Bruce La Pierre, Editorial, *A Little Problem of Constitutionality:. . .But the Court May Not Save the Day*, ST. LOUIS POST-DISPATCH, Mar. 27, 2002, at B7. Lapierre noted that "[the Supreme Court is] ready—just like Congress and president George W. Bush—to sacrifice some of our political freedom on the altar of post-Enron public passions." *Id.*

VI. CONCLUSION

At first glance, the majority in *Colorado II* seemed to follow the precedent set in *Buckley*; independent expenditure limitations are unconstitutional, while those on contributions, including coordinated expenditures, are constitutional. There was a big difference in the two cases, however: *Buckley* involved individuals and political committees, while *Colorado II* involved a political party. This was an important distinction, one the Court did not seem to recognize. This failure resulted in an opinion that left much to be desired, causing the campaign finance area to remain murky. The impact of the Court's inattention to these issues is that *Buckley* and *Colorado II* are inconsistent with each other, which will ultimately lead to confusion in campaign finance laws. Furthermore, because the *Colorado II* majority failed to acknowledge that political parties are not the same as other political actors because of their constitutional status, as well as their exceptional role in carrying out the goals of democracy, it also did not consider the possibility that parties' spending on the election of its candidates is necessary if they are to fulfill those responsibilities. While the weakest link in the Court's decision in *Colorado II* is that it failed to consider the above points, the conclusion is also the weakest link in a long chain of Supreme Court campaign finance decisions that will ultimately result in more confusion in this area of the law, and with the passage of the new campaign finance legislation, that confusion is likely to come sooner rather than later.

AMANDA G. ALTMAN*

* J.D. Candidate, Saint Louis University School of Law; B.A. Saint Louis University. This Note is dedicated to Mr. and Mrs. Jacob Altman, Mr. and Mrs. Martin Hecht, and Mr. and Mrs. Edwin Sievon. I would like to thank my faculty advisor, Associate Dean Joel K. Goldstein, Saint Louis University School of Law, without whose help this article would not have been possible. I would also like to thank Daniel J. Kessler for always believing in me, and for his much needed patience and understanding.